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May 9, 2008

Honesto Gatchalian
Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Pre-Workshop Comments of the California Wind Energy Association and Large-scale Solar Association Regarding SB 1036 Implementation

Dear Energy Division:

Pursuant to the Energy Division's Request for pre-Workshop Comments Regarding SB 1036 Implementation ("Workshop Request"), the California Wind Energy Association ("CalWEA") and the Large-scale Solar Association ("LSA")¹ respectfully submit these comments in response to the Workshop Request.

I. ISSUES RAISED IN COMMENTS ON DRAFT RESOLUTION E-4160

- 1. The cost limitations established by SB 1036 involve summing funds that would have been collected over several years. SB 1036 does not suggest that a discount rate should be applied to the calculation of the limit. Yet, the funds do impose real costs and benefits on various stakeholders, each with a different perspective on the time value of money.**

- Discuss whether a discount rate should be applied to the cost limitation calculation.

¹ The LSA is a newly-formed organization consisting of concentrated solar power companies and includes Abengoa Solar, Inc., Ausra, Inc., Brightsource Energy, Inc., and Solel, Inc. Note these companies filed comments jointly with CalWEA on Draft Resolution E-4160 on April 1, 2008 (referred to therein as the Concentrated Solar Power Companies). All of these companies are actively involved in developing solar generation projects for the California market and the State's Renewables Portfolio Standard program.

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- Absent SB 1036, would the PGC funds collected have been subject to financing charges, interest payments or a discount rate that would directly or indirectly affect the cost limitations? If yes, please cite the legislation, documentation, precedent, or practice on which you base your answer.
- Please provide a spreadsheet calculation (and all supporting documentation) if you propose a calculation that differs from the calculation proposed in Draft Resolution E-4160.

CalWEA and LSA reserve the right to comment on these issues more fully in the workshops and in their post-workshop comments.

2. **Attached to this Pre-Workshop Comment Request is the Staff's proposed AMFs Calculator. Prior to SB 1036, the CEC's proposed method for calculating above-market costs was to calculate the difference between the levelized bid price and the applicable levelized MPR. The nominal sum of that difference represented the total amount of SEP funds requested by the generator, and was then to be paid over the life of the contract. With SB 1036, funds for AMFs will not be collected up-front through the public goods charge, but rather will be recovered in utility rates.**

- Should a discount rate be applied to the AMFs request of an RPS contract? If so, should the discount rate be the utility's authorized WACC or another discount rate? Please provide a credible public source of data for establishing another discount rate.

CalWEA and LSA reserve the right to comment on these issues more fully in the workshops and in their post-workshop comments.

3. **Comment on whether contracts with prolonged negotiations (e.g. the contract is executed more than 18 months since the close of the solicitation in which it bid) or projects that have significantly changed since the original bid should be considered bilateral contracts and thus not eligible for AMFs.**

CalWEA and LSA oppose a bright-line, 18-month rule for AMF eligibility because it would elevate negotiation speed over more far more important RPS objectives, creating unintended consequences such as decreasing renewable energy production, increasing renewable energy costs, and stifling innovation. For instance, circumstances beyond the control of an IOU or renewable energy generator may delay a given negotiation process, such as a change in

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applicable law or a change in the status of a renewable energy developers' interconnection application. In addition, although it makes sense to encourage the IOUs and renewable energy developers to try to complete their negotiations within a reasonable time period, this objective should not be paramount. Indeed, it may be that certain transactions are complex and by their nature take longer than the allotted time to complete, or that additional time may be required to optimize the cost and overall performance of the project. It is not equitable to change the "rules of the game" in the middle of a negotiation if such factors are present.

Additionally, there is currently no Commission-adopted rule requiring the IOUs and renewable energy developers to complete their negotiations within a specified amount of time, and there is no legislative authority for denying AMFs to a given transaction because it took more than a specified amount of time to complete. Furthermore, there is no basis for preferring AMF awards based on the time needed to complete negotiations, rather than on other, more important RPS objectives. For these reasons, CalWEA and LSA oppose a hard 18-month rule as proposed.

CalWEA and BSA believe that it may be appropriate for the Commission to issue a more flexible rule requiring that, if a transaction is not completed within 18 months following the close of a solicitation, the parties must justify the delay in order for the transaction to be eligible for AMFs as part of the original solicitation. If there is no valid reason why the negotiation took the excessive time to complete, the transaction could be disqualified vis-à-vis the original solicitation. However, the Commission should allow the IOUs to roll over a delayed RPS contract into its next RFP cycle — and thus employ the next MPR — if the negotiation process exceeds 18 months.

4. Identify what is the appropriate MPR to calculate an AMFs request for a contract in each of the following situations:

- With prolonged negotiations (e.g., a contract executed more than 18 months after the close of the solicitation)

The Commission should not attempt to adopt a bright-line rule for determining which MPR to apply to a given contract that has been delayed. In some circumstances, it may be appropriate to apply the MPR from the next solicitation. This might be the case where the parties began negotiating in earnest late in the process, the draft MPR for the next solicitation was released during their negotiations and the pricing of the contract changed materially after the draft MPR was released. Under other circumstances, however, it may be appropriate to continue to employ the original MPR. This might be the case in a complex transaction or if negotiations were delayed due to factors outside of the parties' control.

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Rather, the Commission should adopt a flexible rule — or, alternatively, a presumption — that if a transaction took longer than a certain amount of time to complete, and the draft MPR was released for the next solicitation cycle, the parties need to demonstrate that it would be appropriate nevertheless to apply the original MPR and not the next MPR to the contract.

- That has been previously approved, but is requesting a price amendment

Again, CalWEA and LSA do not believe that a bright-line rule is appropriate, as the circumstances related to any given amendment could point to one conclusion or another. Instead, the Commission should adopt a flexible rule that takes into consideration when the amendment occurs and the scope of the amendment. If an amendment, for example, does not amend the price of the contract, there may be no basis for applying a different MPR in considering its approval. In circumstances where the amendment makes fundamental changes to the contract and seeks to alter the price, however, CalWEA and LSA would expect that the then-current MPR would be employed, as it best reflects the market conditions that prevailed when the parties made the change to the contract.

- With an expected commercial online date that is unrealistic given expected transmission upgrade needs.

CalWEA and LSA believe that the circumstance presented — an unrealistic expected commercial operation date — is not an MPR selection issue, but rather a PPA-approval or AMF authorization issue. The IOUs bear the burden of demonstrating the viability of the generating project (including the viability of any associated transmission upgrades that the IOUs and/or generation owner decide to build and/or advance construction funds for) in order for the Commission to approve the PPA and award AMFs. In these circumstances, the Energy Division should request additional information from the parties as to the likelihood of the project coming on-line when expected; if the showing is inadequate, the Commission should consider rejecting the contract. This does not mean that the Commission should require a date-certain or limit necessary contractual flexibility regarding on-line dates. The key is to ensure that the IOUs and developers are operating in good faith, rather than gaming the AMF process.

5. Discuss whether the following proposed eligibility criteria promote the efficient use of limited AMFs in a manner that maximizes benefits for ratepayers, shareholders, and the RPS Program:

- The contract price is an all-in fixed price for a bundled energy product from a RPS-eligible facility

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The Commission should not rule out the possibility of separate capacity and energy payments as a component of the contract price, as separate capacity and energy payments can easily be converted to an all-in price for the purposes of analysis. Additionally, CalWEA and LSA propose that a contract price that allows for escalation should also be eligible for AMFs, whether the escalation rate is fixed or based upon one or more market indices. Although allowing for the above may require a second step in the AMF calculation (i.e., conversion to a fixed price based upon reasonable assumptions), it is better not to have the AMF calculation limit the kind of contracts and prices that may be entered into.

- The contract is with an RPS-eligible facility that is physically located in California

As stated in CalWEA and CSPA's (now LSA) Comments on Draft Resolution E-4160, CalWEA and LSA oppose any requirement that in order to be eligible for AMFs, the renewable energy project must be physically located in California. Such a requirement is not logical in light of current State law, Commission policy and Federal regulations providing for open access to the interconnected transmission grid within the Western United States.

For instance, Public Resources Code Section 25741(b) defines "in-state renewable electricity generation facilities" as including out-of-state facilities that meet certain criteria. Specifically, the facility must be one of the following:

(A) The facility is located in the state or near the border of the state with the first point of connection to the transmission network within this state and electricity produced by the facility is delivered to an in-state location.

(B) The facility has its first point of interconnection to the transmission network outside the state and satisfies all of the following requirements:

(i) It is connected to the transmission network within the Western Electricity Coordinating Council (WECC) service territory.

(ii) It commences initial commercial operation after January 1, 2005.

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(iii) Electricity produced by the facility is delivered to an in-state location.

(iv) It will not cause or contribute to any violation of a California environmental quality standard or requirement.

(v) If the facility is outside of the United States, it is developed and operated in a manner that is as protective of the environment as a similar facility located in the state.

(vi) It participates in the accounting system to verify compliance with the renewables portfolio standard by retail sellers, once established by the Energy Commission pursuant to subdivision (b) of Section 399.13 of the Public Utilities Code.²

Thus, any requirement that, in order for a project to be eligible for AMFs, the project must be physically located in California is contrary to established Commission policy and law. The Commission should eliminate this criterion from any proposed process for administration of AMFs. At most, the criterion should be used as one aspect evaluated as a tiebreaker between two competing projects.

- The project is not otherwise eligible for other Commission-approved funding programs (e.g. Application 07-07-015 pending Commission approval for Emerging Renewable Resource Program (ERRP))
- The AMFs request cannot include firming and shaping costs.

CalWEA and LSA reserve the right to comment on the issue of firming and shaping costs in the workshops and in post-workshop comments.

6. Discuss how a “true-up” of awarded AMFs will or will not affect the financing for a RPS project.

A “true up” of awarded AMFs should not affect the financing for a RPS project, because AMFs are not a payment to the renewable energy generator, but rather an accounting mechanism employed by the IOUs to track funds previously set aside. Indeed, the primary impetus for the statutory change from SEPs to AMFs was the recognition of the inability to finance SEP payments, whose availability could not be assured. Thus, renewable energy generators must not

² Public Resources Code § 25741(b)(2).

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be dependent upon the availability of AMFs for financing, and any true up must be disconnected from the contract so that it does not affect the financing. This question, however, raises a significant issue that should be addressed in the workshops; that is, with respect to accounting for AMFs on an ongoing basis, should the AMFs accounting be based on forecast amounts only, or should the Commission require IOUs to “true up” the forecast amounts with actual amounts on a periodic basis? Although there are likely pros and cons associated with each view, in light of the possibility that projects awarded AMFs might not be constructed, it is necessary to free up any awarded, but unused, AMFs by truing up the relevant calculations.

7. Identify any material factual disputes that may require an evidentiary hearing.

CalWEA and LSA do not believe, at this time, that hearings will be required.

8. Draft Resolution E-4160 proposed review standards for contracts with above-MPR costs. In comments, a number of parties questioned whether the Commission review standards should be consistently applied to all contracts. Below is a list of different RPS contract types the Commission reviews. Please comment on whether the Commission should review the following types of renewable contracts using the same or varying review standards. If varying review standards should be used, please provide rationale for using different standards and identify which review standards should apply to which contract types.

For all of the following situations, with the exception of contracts with prices above the MPR compared with contracts with prices below the MPR, CalWEA and LSA propose that the same standard of review should apply to all the contracts. The fundamental question at issue in each of these scenarios is whether the price is reasonable in light of the product being offered. The contract price is ultimately born by the ratepayers regardless of AMF allocation, and so the same standard should apply across the board. With respect to the MPR, as this serves as a measure of the market value for long-term power purchases, it is logical to subject the reasonableness of a contract price below the MPR to less scrutiny than a price above the MPR. However, as all proposed contracts have survived the competitive process, the primary issues are whether the bid evaluation process was sound, whether the contract price is reasonable and whether the contract is needed to meet RPS goals. If so, there is no reason to question the AMF allocation.

- Contracts negotiated as part of a competitive solicitation
- Bilateral contracts

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The same standard should apply when evaluating contracts with above-MPR costs negotiated as part of a competitive solicitation or bilateral contracts. Although the natural inclination may be to assume that PPAs negotiated through the RFP process require less scrutiny because they have already undergone layers of review as opposed to a bilateral contract, contracts emerging from a solicitation are eligible for AMFs, while bilateral contracts are not. As such, one could potentially argue that bilateral contracts merit less scrutiny. In the end, both kinds of contracts will be funded by ratepayers and this is the paramount consideration; a uniform set of reasonableness standards is the most equitable approach.

- Short-term contracts

Similarly, the same review standard should apply to short and long-term contracts. Both types of contracts fill specific needs in an IOU's portfolio, and any valuation difference is captured by the contract price (accounting for the time-value of money). Thus, the fundamental question remains whether the contract price is reasonable in light of the product being offered.

- Contracts with prices greater than the MPR
- Contracts with prices below the MPR

CalWEA and LSA propose that in this circumstance only, a different standard of evaluation should apply. Contracts with prices below the MPR are presumed reasonable, as the MPR establishes the market break point for power purchases. All else being equal, a contract priced below the MPR should not require the same scrutiny for reasonableness as a contract priced above the MPR.

- Projects smaller than ~20 MW
- Utility-scale projects (~ greater than 20 MW)

Again, the same review standard should apply to all projects regardless of size. The question should be whether the contract price is reasonable in light of the product being offered.

- New or repowered generation
- Existing generation

Again, the same review standard should apply to all projects regardless of operational status. In order for California to meet its RPS objectives, it is necessary to attract new projects as well as to retain existing projects. The Commission should not favor one type of project over another because of its vintage. This is not to say that project viability is a meaningless criterion or that the Commission, in assessing the viability of a project, should ignore, for existing projects, the length of time that it has been operating or its performance history, or for new projects, the technical feasibility of its projected development and operation. Real world differences between projects must be accounted for in the Commission's evaluation of a project;

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the point is that all projects should be subject to the same approval criteria, with project viability being one of those criteria.

- Wholesale distributed generation

Assuming that wholesale distributed generation projects must participate in the competitive solicitation process, then these projects should be evaluated on the same criteria as other project when the Commission evaluates them for AMFs. As previously stated, all projects should be subject to the same approval criteria, with project viability being one of those criteria.

- Technologies that have not been commercially demonstrated

As with the other types of contracts, this is one of several criteria to be considered in an overall assessment. If a technology is new and not commercially tested, the Commission should consider the data provided on the technical feasibility of the facility's projected development and operation as part of the viability assessment. No additional criteria need to be applied to this type of contract.

- Contracts that are eligible for AMFs
- Contracts ineligible for AMFs

As with the competitive solicitation versus bilateral PPAs comparison, ultimately the ratepayer pays for both contracts. Thus, no additional level of scrutiny, beyond what is currently employed, is necessary.

- AMF need is \$1,000,000
- AMF need is \$70,000,000

Again, so long as the Commission examines whether the contract price is reasonable in light of the product being procured, the bid evaluation process was sound, and the contract is needed to meet RPS goals, no different criteria are required. If two projects will yield the same volume of RPS eligible energy³ and involve the same essential product, and one project is priced well above the MPR and the other is priced closer to the MPR, the answer is easy: the lower price wins. The focus must be on the relative value of the product in achieving RPS objectives: unless a utility is purchasing a more valuable product, there is no reason to favor a higher priced project over a less expensive project.

³ Of course, if the AMF need varies because one project produces more energy than the other and the prices are the same, the standards applicable to the contracts are to be valued the same (assuming that there are sufficient AMFs to accommodate both).

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II. PARTY PROPOSALS

a. A wind contract was negotiated as part of 2006 solicitation, but is not executed and filed with Commission until end of 2008. The project's least-cost best-fit (LCBF) ranking was favorable in comparison to other 2006 bids, but the price has increased from the bid price because wind turbine and other project development costs have increased. What MPR (e.g. 2006 or 2008) should the Commission use in calculating AMFs for the project?

Assuming that the Commission had published the 2008 MPR before the contract was executed, CalWEA and LSA propose that the 2008 MPR is the most appropriate MPR to use to calculate AMFs in this hypothetical. This is because the price in the contract was adjusted after the 2006 MPR was released. As discussed above, unless there is a reasonable basis to do otherwise, the applicable MPR for a given project should be the MPR in effect at the time of PPA execution.

b. A contract for a project with an above-MPR price was executed in 2008 before any transmission studies were completed. Specifically, the COD in the contract is 12/31/2010, but transmission studies completed after the contract's execution show that major upgrades are needed and it will take an additional 40 months to complete the transmission. The Advice Letter compares the contract to the 2008 MPR with a 2010 online date. What MPR (MPR year and COD) should the Commission use in calculating AMFs for the project?

In this circumstance, the Energy Division should ask the utility whether the project is viable and whether the utility's use of the MPR with a 2010 on-line date is a reasonable assumption. Unless the utility has a good explanation or changes its submission to include a later COD (based on the 2008 MPR), the Commission should reject the contract.

c. A project with a Commission-approved contract has renegotiated its price to reflect higher equipment costs. Should the project be eligible for AMFs? If so, what MPR should the Commission use in calculating AMFs for the project (e.g., original MPR, most recently adopted MPR or does it depend on time lapsed between original and supplemental AL?)?

As discussed above, whether the PPA is eligible for AMFs and selection of the appropriate MPR turn on the question of whether the amendment materially affects the price of the PPA (in this case it does) and the circumstances of the renegotiated price. Obviously, if there is no logical explanation as to why the price was renegotiated, then awarding AMFs would be unjustified, and would provide a perverse incentive for reopening contracts without meritorious

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reasons. In reality, the question here should not turn simply on how much time has elapsed since the original contract was approved, but rather on the good faith reasons supporting the renegotiated contract. As to which MPR applies, if the change in price is material, then the Commission should employ the MPR in effect at the time that the amendment to the PPA is executed. This MPR is the most accurate reflection of market cost at the time of the material amendment to the PPA.

d. A utility requests AMFs for two similar (same technology, capacity, and comparable location) solar photovoltaic projects, and there are not enough AMFs remaining for both projects. One project is slightly above the MPR, while the other one is significantly above the MPR. It may be true that market power is being asserted or that a developer is unrealistically estimating project costs, or that there are project costs that differ between projects. Neither of the first two scenarios is in the ratepayer's best interest: the ratepayer may be overpaying, or a project may not be viable and is tying up AMFs or limited Commission resources may unnecessarily be consumed with processing a price amendment. As a result, how should the Commission determine if one project's costs are more reasonable and realistic than the other? What standards could be applied to determine which contract should be applied toward the utility's cost limitation? Examples of review standards are bid supply curves, cash flow models, and RETI cost curves .

CalWEA and LSA oppose any proposal that tasks the Commission with responsibility for investigating a project's costs and financial viability. This will overcomplicate the RPS process and chill developers' willingness to participate in California's markets. Nonetheless, if two largely equivalent projects are proposed with materially differing costs, the Commission should expect and should receive a reasonable explanation for the differences (as suggested in the question, this may include differing materials costs). Once determining that the explanation is reasonable, the Commission's responsibility should be satisfied. If the Commission is concerned about a contract's viability or a potential windfall to a developer, the Commission could appoint a utility independent evaluator to comment on the reasonableness of proposed contract from a market perspective.

The IOUs, and not the Commission, bear the burden of evaluating and demonstrating the viability of a project and presenting its viability to the Commission, along with evidence of robust competition and a fair bid evaluation process. Although the Commission has a stake in evaluating the project viability criterion, the best approach to this question would be to hold the IOUs strictly accountable for meeting their RPS requirements and limit their ability to rely on developer non-performance as an excuser thereto. Applying this framework to the hypothetical, and providing that reasonable explanations have been provided for the differing costs, the Commission should award AMFs for both projects to the extent of availability; if there are insufficient AMFs, the Commission should choose the less expensive project if the IOU has demonstrated that the less expensive project is reasonably viable.

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e. One utility has two projects pending Commission approval that will each require \$10 million in AMFs. There is, however, only \$10 million in AMFs available. The projects are in various stages of project development with varying capacities and transmission costs. What standards should the Commission use to determine which project should receive AMFs?

In evaluating these contracts, the Commission should evaluate the reasonableness of the price to be paid (which should include the cost of (i) required transmission upgrades (reliability network upgrades) and (ii) transmission upgrades that the generation developer chooses to advance construction funds for (delivery network upgrades) as an adder) against the products being procured (if more capacity is to be procured from one project at a lower total cost, then that project has an advantage). Viability should be given some consideration as well. All things being equal, the project that is in a more advanced stage of development should be allocated the remaining AMFs.

f. A project that received AMFs came on line after the on-line date that was used to calculate the AMFs request. If the AMFs were calculated with the actual on-line date, additional AMFs would be made available to support another project. How should actual, versus the projected COD, be used to determine the AMFs to be awarded to a project? When should that determination be made?

This question addresses issues similar to those CalWEA and LSA raised in response to Question 6 — whether a true up of forecast versus actual AMFs should be incorporated. As there are pros and cons associated with truing up the AMFs, CalWEA and BSA propose that the Commission and parties explore this question further in the workshops.

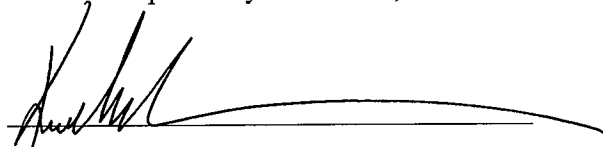
g. AMFs are awarded to a project, but the project fails to come on line by the contractual on line date. At what point should the Commission revoke AMFs and reallocate the funds back to the AMF account or to another project? What standards should be used to make a decision to revoke or reduce AMFs?

Again, the Commission needs to hold the IOUs accountable for the PPAs that they enter into with renewable project developers and their administration of these PPAs. Any allocated AMFs should be revoked when the IOU terminates the PPA. If the project has failed to come on line by the contractual on-line date, and the developer is in default (i.e., there are no excused delays), the IOU has the ability and, in the absence of good reasons to avoid terminating the PPA, the responsibility to terminate the PPA. AMFs for terminated PPAs should be returned to

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the IOUs for re-allocation. The IOUs are to be held accountable for meeting their RPS requirements, and should be expected to act appropriately.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Joseph M. Karp', is written over a horizontal line.

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